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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1942.

No. 838...

R. A. BLOUNT, HEARST B. BLOUNT, LONNIE FLINN and EUNICE SIMPSON,
Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD.

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Eighth Circuit

and

BRIEF IN SUPPORT.

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Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD.

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Eighth Circuit.

R. A. Blount, Hearst B. Blount, Lonnie Flinn and Eunice Simpson, the petitioners, respectfully pray that a writ of certiorari issue to review the judgment and decree of the Circuit Court of Appeals for the Eighth Circuit (R. 561) entered in the above cause on December 24, 1942, enforcing a decision and order of the National Labor Relations Board entered on December 16, 1941 (R. 523). The Board found that the miners and haulers engaged in mining and hauling barite or tiff on and from the petitioners' property in Washington County, Missouri, are petitioners' "em-

ployees" within the meaning of that term as used in the National Labor Relations Act (49 Stat. 449 et seq., 29 U. S. C. A., Sec. 151 et seq.), and that the petitioners refused to bargain collectively with International Union of Mine, Mill and Smelter Workers, Local 113, affiliated with the C. I. O. (hereinafter referred to as "union") as the representative of said miners and haulers in violation of Section 8 (5) of said Act (49 Stat. 452, 29 U. S. C. A. 158). The Board ordered the petitioners to bargain with the union.

OPINIONS BELOW.

The decision and order of the National Labor Relations Board (R. 523) is reported in 37 N. L. R. B. 662. The opinion of the Circuit Court of Appeals (R. 545) and the dissenting opinion of Judge Riddick (R. 553) are reported in 131 Fed. (2d) 585.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended [28 U. S. C. A., Sec. 347 (a)]. The opinion of the Circuit Court of Appeals was filed on November 4, 1942, and judgment was entered on December 24, 1942 (R. 561). Petition for rehearing was denied on November 27, 1942 (R. 561).

QUESTIONS PRESENTED.

1. Did Congress intend that the coverage of the National Labor Relations Act should extend to persons who are not "employees" within the meaning of that term at common law?

2. Are the miners and haulers, over whom the petitioners have no right of control as to how and when they perform their work, "employees" within the meaning of Section 2 (3) of the National Labor Relations Act [29 U. S. C. A.,

Sec. 152 (3)], and are the petitioners "employers" within the meaning of Section 2 (2) of said act [29 U. S. C. A., Sec. 152 (2)]?

3. Does the conclusion of the Board as to the existence of the employer-employee relationship, based upon findings of fact, some of which are not supported by the evidence and others showing no control in the petitioners over how and when the work is performed, form the basis of a valid and enforceable order?

4. Is the status of the miners as independent contractors for a definite term under their contract with the petitioners as contained in the Mining Act of the State of Missouri (R. S. Mo. 1929, Secs. 13593-97),[1] as interpreted by the highest courts of Missouri, binding and controlling on the Board?

5. Is the status of the miners and haulers as independent contractors under the law of the State of Missouri binding and controlling on the Board?

6. Is the application of the National Labor Relations Act to independent persons whose occupational enterprise is not subject to control as to time and manner of performance, and who have a statutory right to continue their enterprise for a definite period of time, an unreasonable interference with the obligations and liberty of contract in violation of the Fifth Amendment to the Constitution of the United States?

STATUTE INVOLVED.

The statute involved is the National Labor Relations Act, approved July 5, 1935, 49 Stat. 449 et seq., 29 U. S. C. A., Sec. 151 et seq., particularly Sections 2 (2) and (3), 8 (5) and 9 (a) of said Act, 29 U. S. C. A., Sections 152 (2)

[1] R. S. Mo. 1939, Secs. 14783-87.

and (3), 158 (5) and 159 (a). These sections of the National Labor Relations Act are set forth in Appendix A, infra, p. 25.

STATEMENT.

The petitioners are tenants in common of approximately 640 acres of land known as the "Paw Paw Patch," located near Richwoods, Washington County, Missouri. These lands are managed for the petitioners by the petitioner, R. A. Blount, who collects the royalties on the barite or tiff produced therefrom and accounts to his cotenants for their shares of the royalty. Petitioner R. A. Blount also purchases individually some of the tiff mined and hauled from said property. Royalties on tiff produced from the property, whether purchased by R. A. Blount or others, are divided equally among the petitioners.

Tiff is mined on and hauled from said property to purchasers by from seventy-five to 100 miners and haulers. These mining operations are conducted exclusively by hand methods, consisting in the main of the sinking of shallow shafts and the removal of the ore by means of hand shovels and windlasses. In these operations the miners furnish all their own tools and equipment.

A miner first obtains permission from petitioners to mine on their said property. After obtaining such permission the miners do their own prospecting, sink their shafts at locations selected by themselves, and generally work individually or in small groups in these and subsequent mining operations. The petitioners give the miners no orders or instructions as to where to work or how to work, or how much tiff they should mine, or when to start or quit work.

Permits for the hauling of tiff from said property are given by the petitioners to persons who own their own trucks and use them for this purpose.

[The foregoing facts appear in a stipulation between the Board and the petitioners (R. 411).]

The relationship between the miners and the petitioners is regulated by the Mining Act of Missouri (R. S. Mo. 1929, Sections 13593-97), and in particular by sections 13594-97 thereof, since the petitioners did not post notices containing the terms of the contract as provided in section 13593 (R. 414). These sections of the Missouri statutes are set forth in Appendix B, infra, pp. 26-30. Under these sections, the petitioners not having posted notices containing the terms of a contract, each miner has the statutory right to mine on the property for a term of three years, provided that he does not discontinue mining for as long as ten consecutive days, excluding Sundays, in any calendar month. The petitioners have an option to purchase tiff mined on their property at the highest market price.

The miners can change their haulers and frequently do so in order to secure haulers who will perform favors for them (R. 34-5, 130, 215, 298, 304-5), and the petitioners have never made any effort to interfere with a miner in changing his hauler (R. 34-5, 298-99, 337). The miners and haulers do not spend all their time working on the petitioners' property, but they have been free, subject only to conditions of the aforesaid Missouri statutes, to mine and haul tiff from other property not under the petitioners' control and to engage in other enterprises without objection from the petitioners (R. 76, 77, 123, 86, 266-67, 271, 283, 297, 309, 326).

R. A. Blount, the petitioners' agent for the collection of royalties, had visited the petitioners' said property (which is located twenty miles from his home and place of business) only once during the five years preceding the hearing in this case (R. 33). There is no evidence that the petitioners or any agent ever visited the property on any other occasion, or that the work of the miners and haulers is

supervised in any respect. The only requirement which R. A. Blount makes when buying tiff on his own behalf, and not as agent for the petitioners, is that it be clean and dry (R. 40, 334). No record is kept by the petitioners as to the production of any miner or hauler (R. 71-72).

The Board entered its order directing the petitioners to bargain collectively with the union as representative of the miners and haulers and petitioned the Circuit Court of Appeals for enforcement. The Circuit Court of Appeals enforced the order. Judge Riddick filed a dissenting opinion.

SPECIFICATION OF ERRORS TO BE URGED.

The Circuit Court of Appeals erred:

(1) In not holding that the terms "employer" and "employee," as used in the National Labor Relations Act, are to be interpreted in their common-law sense, there being nothing in said act or its legislative history indicating that Congress intended that the Board should go beyond the common-law concepts in determining whether the employer-employee relationship exists.

(2) In not holding that the findings upon which the Board bases its conclusion that the miners and haulers are employees are immaterial to that issue, even if supported by the evidence, since these findings show no right of control in the petitioners over the miners and haulers.

(3) In holding that the Board's findings and conclusion that the miners and haulers are petitioners' employees within the meaning of the National Labor Relations Act are supported by material and substantial evidence.

(4) In not holding that under the Missouri Mining Statutes, as interpreted by the Missouri courts, the miners are independent contractors.

(5) In not holding that the relationship between the petitioners and the miners and haulers under the law of the State of Missouri is binding and controlling upon the Board.

(6) In requiring the petitioners to exercise the functions of "employer" (by collective bargaining), the exercise of which would be in violation of the Mining Act of Missouri.

(7) In not holding that the enforcement of the Board's order would constitute an unreasonable interference with the obligations of existing contracts between the petitioners and the miners, in violation of the Fifth Amendment to the Constitution.

(8) In not denying enforcement of the Board's order.

REASONS FOR GRANTING THE WRIT.

1. The decision of the court below involves important questions of national interest which have not been, but should be, settled by this Court. The principal question involved, upon which there were divergent views in the court below, is whether the National Labor Relations Act requires the petitioners to engage in collective bargaining with a union representing persons over whom the petitioners have no right of control as to how and when they carry on the enterprise in which they are engaged. It is important that this Court resolve this question since the decision of the court below has placed in doubt the status under the National Labor Relations Act of numerous independent contractors throughout the United States. The decision therefore vitally affects the administration of said act and is one of great public interest and importance.

2. The decision is in conflict with the provisions of the act.

(a) There is no indication in section 2 (2) and (3) of

the act,[2] or in any other section, that Congress intended that the coverage of the act should extend beyond the employer-employee relationship as recognized at common law, and the legislative history of the act indicates no congressional intention to apply the act to any controversy that does not have the common-law relationship of employer-employee as its foundation.

(b) The decision ignores a cardinal principle of statutory construction: that it will be presumed that the terms used in Acts of Congress were used in their usual and well-settled sense, unless Congress has expressed a contrary intention. **United States v. Stewart, 311 U. S. 60, 61 S. Ct. 102, 85 L. Ed. 40.**

(c) The decision, we believe, ignores controlling decisions of this Court holding that the term "employee," when used in an Act of Congress, means, in the absence of expressed congressional intention to the contrary, a person who is subject to the right of control in another as to the manner and means by which his work is accomplished, as well as the result to be accomplished. **Hull v. Philadelphia & Reading Railway Co., 252 U. S. 475, 40 S. Ct. 358, 64 L. Ed. 670; Metcalf v. Mitchell, 269 U. S. 514, 46 S. Ct. 172, 70 L. Ed. 384.**

3. The decision ignores the fact that the right of control over the manner in which work is performed is inherent in collective bargaining. In failing to recognize this fundamental fact we believe that the decision conflicts with the decision of this Court in **Columbia River Packers Association v. Hinton, 315 U. S. 143, 62 S. Ct. 520, 86 L. Ed. 750.**

4. The decision ignores the fact that the Board's conclusion that the haulers and miners are employees is based on findings of fact which are not material to that issue,

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[2] Set forth in Appendix A, infra, p. 25.

namely, (1) that petitioner R. A. Blount arranges for the disposition of the tiff after it has been mined, (2) that the petitioners "operate" their property "for the purpose of obtaining a money income from the mining and sale of the tiff located there," (3) that "the miners and haulers engaged in the manual labor of mining and hauling the respondents' tiff, and receive therefor particularly small earnings," and (4) that the miners and haulers have joined a labor organization (R. 525-7).

5. The decision ignores the fact that the Board's findings, (1) that the permits to mine are revocable at will, and (2) that in effect the miners have no property interest in the tiff mined, are in direct conflict with the rights of the miners under the Missouri Mining Act.[3]

6. The decision misinterprets the decisions of the Missouri courts in **Woodruff v. Superior Mineral Co., 230 Mo. App. 616, 70 S. W. (2d) 1104**, certiorari quashed, **337 Mo. 718, 85 S. W. (2d) 743**, and fails to hold that under the Missouri Mining Act the miners are independent contractors. The decision also ignores the fact that under the law of the State of Missouri the right of control over the manner in which work is performed, as distinguished from control over the result, is an essential element in the employer-employee relationship. We, therefore, submit that the status of the miners and haulers under the law of the State of Missouri is controlling on the Board.

7. The decision fails to take into account the fact that the Board's order (1) requires the petitioners to violate their contract with the miners under the Missouri Mining Act, and (2) denies to persons the liberty to contract to assume relationships which do not contain elements of control inherent in the employer-employee relationship. This,

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3 Set forth in Appendix B, infra, pages 26-30.

we submit, is in violation of the Fifth Amendment to the Constitution of the United States.

CONCLUSION.

It is respectfully submitted that, for the reasons stated, this petition for certiorari should be granted.

LOUIS H. BREUER,
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SAMUEL RICHESON,
HARRY O. SMITH,
Of Counsel for Petitioners.

BRIEF

In Support of Foregoing Petition for Certiorari to United States Circuit Court of Appeals, Eighth Circuit.

I.

The terms "employer" and "employee," as used in the National Labor Relations Act, should be construed in their usual and long-established sense.

The Board found that the petitioners had violated section 8 (5) of the act by refusing to bargain collectively with the union as representative of the miners and haulers, found by the Board to be employees. The only definitions contained in the act of the terms "employer" and "employee" are found in sections 2 (2) and (3),[1] but these definitions give no indication that Congress intended that the Board should have jurisdiction over any controversy under section 8 (5) not having the common-law employer-employee relationship as its foundation. Section 2 (3) does provide that "the term 'employee' * * * shall not be limited to the employees of a particular employer * * *," but Senate Committee Report No. 573 (May 2, 1935) makes it clear that this provision has no application to the instant case. Also see **Columbia River Co. v. Hinton, 315 U. S. 143, 146, 62 S. Ct. 520, 86 L. ed. 750,** in which this Court, in interpreting Section 13 of the Norris-LaGuardia Act (47 Stat. 73), said (l. c. 146):

> "We recognize that by the terms of the statute there may be a 'labor dispute' where the disputants do not stand in the proximate relation of employer and employee. But the statutory classification, however broad, of parties and circumstances to which a 'labor dispute' may relate does not expand the application of

1 Set forth in Appendix A, infra, p. 25.

the Act to include controversies upon which the employer-employee relationship has no bearing."

Since Congress expressed no intention that the terms "employer" and "employee' used in the act should be interpreted (except in circumstances not here present) at variance with the commonly accepted understanding of those terms at common law, i. e., implying the right of control over the manner in which work is performed **(Singer Manufacturing Company v. Rahn, 132 U. S. 518, 10 S. Ct. 175, 33 L. ed. 444)**, it will be presumed that Congress knew their established meaning and so used them.

United States v. Stewart, 311 U. S. 60, 61 S. Ct. 102, 85 L. ed. 40;
Old Colony R. Co. v. Commissioner, 284 U. S. 552, 52 S. Ct. 211, 76 L. ed. 484.

This Court has applied the test used in the **Singer case**, supra, in determining the meaning of the term "employee" used in the Federal Employers' Liability Act, 35 Stat. 65, 45 U. S. C. A., Sec. 51 et seq., and has held that the term does not include "independent contractors."

Hull v. Philadelphia & Reading R. Co., 252 U. S. 475, 40 S. Ct. 358, 64 L. ed. 670;
Chicago, Rock Island & Pacific R. Co. v. Bond, 240 U. S. 449, 36 S. Ct. 403, 60 L. ed. 735;
Robinson v. Baltimore & Ohio R. Co., 237 U. S. 84, 35 S. Ct. 491, 59 L. ed. 849.

The Circuit Court of Appeals for the Tenth Circuit has held under Title VIII, Section 801 et seq., of the Federal Social Security Act, 42 U. S. C. A., Sec. 1001 et seq., that the usual tests are used in determining whether the employer-employee relationship exists. **Jones v. Goodson, 121 F. (2d) 176, 179.** The Circuit Court of Appeals for the Fifth Circuit has ruled similarly under the **Fair Labor**

Standards Act, 29 U. S. C. A., Sec. 201 et seq. Bowman v. Pace, 119 F. (2d) 858.

Under the foregoing cases and established common-law rules, the miners and haulers are not employees of the petitioners. The Board has stipulated that the miners furnish their own tools and the haulers their own trucks, and that both have full freedom of action in determining when and how they perform their work (R. 413-14). The record is barren of any evidence that the work of either is supervised in any respect. Under the Missouri Mining Statutes[2] the miners' right to mine runs for a term of three years, provided they comply with the statutory conditions. The record shows, and the Board has not found to the contrary, that miners are free to mine on property not owned by the petitioners and engage in other enterprises (R. 76-7, 86, 266-67, 271, 283, 297, 309, 326). The miners are not even required to deliver their tiff to the petitioners, since, as stipulated by the Board, all tiff mined on the petitioners' property is sold either to R. A. Blount individually or to third parties (R. 412). However, even if the petitioners required the miners to deliver their tiff to them, or if, as found by the Board, petitioner R. A. Blount arranged for the disposition of the tiff, this would merely be an exercise of control over the results of the work rather than over the manner in which the work is performed. **Woodruff v. Superior Mineral Company, 230 Mo. App. 616, 70 S. W. (2d) 1104, certiorari quashed 337 Mo. 718, 85 S. W. (2d) 743.** We, therefore, submit that the miners and haulers are not employees of the petitioners within the meaning of the act.

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2 Set forth in Appendix B, infra, pp. 26-30.

II.

The decision of the court below ignores the fact that the right of control over the manner in which work is performed is an inherent element in collective bargaining.

The present controversy is essentially one between producers of ore (who are free of any right of control in the petitioners as to the manner in which they carry out their enterprise and who have a contractual license under the Missouri mining statutes to mine for a term of three years, said license being subject to termination "only by consent or by condition broken" **[Bingo Mining Co. v. Felton, 78 Mo. App. 210, 214-15]**), and the owners of the land on which the miners conduct their independent enterprises. The petitioners are not engaged in the business of mining and milling tiff, and only one of them, petitioner R. A. Blount, purchases individually, and not as agent for the other petitioners (Stipulation, R. 411), any of the tiff mined on their property.

The court below, therefore, should have held that the National Labor Relations Act has no application in the instant situation, which is not a dispute over "rates of pay, wages, hours of employment, or other conditions of employment" [the terminology used in section 9 (a) of the act], since the elements implicit in those terms are not here present. The terms used in section 9 (a) clearly indicate that an "employer" subject to section 8 (5) must have the right of control over the manner in which work is performed by the persons who are asserted to be his "employees."

If any "dispute" exists in the instant situation, it is one between petitioner R. A. Blount individually and the

miners over the sale of their products. Such a dispute, we submit, is not within the purview of the act.

Columbia River Co. v. Hinton, 315 U. S. 143, 62 S. Ct. 520, 86 L. ed. 750.

In that case, decided under the Norris-La Guardia Act (47 Stat. 70, 29 U. S. C. A., Sec. 101 et seq.), this Court said (l. c. 145):

> "We think that the court below was in error in holding this controversy a 'labor dispute' within the meaning of the Norris-La Guardia Act. That a dispute among business men over the terms of a contract for the sale of fish is something different from a 'controversy concerning terms or conditions of employment, or concerning the association * * * of persons * * * seeking to arrange terms or conditions of employment' calls for no extended discussion. This definition and the stated public policy of the act—aid to 'the individual unorganized worker * * * commonly helpless * * * to obtain acceptable terms and conditions of employment' and protection of the worker 'from the interference, restraint or coercion of employers of labor'—make it clear that the intention of Congress was focused upon disputes affecting the employer-employee relationship and that the Act was not intended to have application to disputes over the sale of commodities."

Since the purpose of the act is substantially the same as Norris-La Guardia Act, i. e., the protection of employees in their right to act collectively in obtaining better terms and conditions of employment, the court below should have held that the act is not applicable in the instant situation.

III.

The decision of the court below misinterprets the decisions of the Missouri courts in Woodruff v. Superior Mineral Co., 230 Mo. App. 616, 70 S. W. (2d) 1104, certiorari quashed, 337 Mo. 718, 85 S. W. (2d) 743, and fails to hold that under the Missouri Mining Act the miners are independent contractors and that such status under the law of the State of Missouri is controlling on the Board.

The court below stated that "There was no division in the Missouri courts deciding that a tiff miner was an employee of the lessee of the ore lands within the intendment of the Compensation Act (**Woodruff** decisions, supra), but if the action had been at common law for damages resulting from failure of a master to perform some duty owed to a servant, doubtless other considerations would have been deemed relevant" (R. 552-53). It is thus implied that, in applying the Workmen's Compensation Act of Missouri, the Commission and the Missouri courts departed from common-law standards in determining whether the claimant was an employee covered by that act. In arriving at this conclusion the court below overlooked the facts (1) that Section 3308 (a), Revised Statutes of Missouri 1929 [Section 3698 (a), R. S. Mo. 1939], selects and specifies, in addition to employees, a limited class of persons, **independent contractors** and their subcontractors, as being entitled to benefits under the act **if injured on the premises of the employer in the course of the employer's usual business there carried on,** and (2) that, apart from the limited class of independent contractors referred to, common-law standards are used in determining whether a claimant is an employee covered by the Compensation Act.

Maltz v. Jackoway-Katz Cap Co., 336 Mo. 1000, 82 S. W. (2d) 909, 912;

Coul v. Peck Dry Goods Co., 326 Mo. 870, 32 S. W. (2d) 758.

The court below also overlooked the fact that in the **Woodruff** case the Missouri courts specifically held that the claimant tiff miner was an independent contractor falling within the limited class specifically covered by section 3308 (a). The facts concerning the relationship in the **Woodruff** case and those in the instant case are similar, except that the miner in the **Woodruff** case sold all of his ore to the mining company engaged in milling it on the premises under lease to it and where he conducted his mining operations. The St. Louis Court of Appeals (230 Mo. App. 616) reviewed the facts concerning the relationship in the **Woodruff** case as follows (l. c. 621):

> "The record discloses that in the summer of 1930 Woodruff left the City of St. Louis and moved to Washington County where he joined his cousin Jim Greenlee, who was mining tiff upon the land under lease to the defendant company. Woodruff assisted Greenlee in his work, and the tiff which they mined was delivered to the defendant company; the money received therefor being divided between them. In the fall of 1930 Woodruff moved into a small house belonging to the defendant, where he was permitted to live without paying rent, and with the permission and consent of the defendant he entered upon the leased land and dug tiff and other minerals thereon until the day of his injury in January, 1932. The tiff which Woodruff mined was hauled to the mill of the defendant, who retained the royalty and deducted the cost of the hauling and paid over the balance remaining to the claimant miner. It is conceded that no orders were given to Woodruff as to where or how or how much tiff he should mine, or when to start or when to quit, and that Woodruff worked as long or as little as he chose, and that he himself furnished the necessary tools and equipment needed for the work."

The Court further stated (l. c. 621) that:

> "Upon the record before us it is apparent that the defendant failed to post a printed statement of the terms, etc., as required by section 13593, and, therefore, plaintiff's rights to mine upon the property leased by defendants became fixed under the terms of section 13594, that is, the rights of plaintiff and defendant company are to be viewed as though there had been a written contract or agreement between the parties conforming to the terms of said section. Plaintiff therefore had a license to continue with his mining for a period of three years subject to defendant's 'lien on all minerals taken or dug therefrom for the royalty due thereon until the same is paid' * * *."

In holding that claimant was entitled to compensation as an independent contractor under section 3308 (a), the Court said (l. c. 622):

> "Our mining statutes therefore furnish the basis of a contract between the defendant mineral company and the claimant herein under which plaintiff, as licensee, mined tiff upon the defendant's property. The mining of the ore under the facts in the case seems to us to be a service rendered by the miner to the defendant mining company; the mining of the ore being work done according to the miner's own methods and without being subjected to the control of the mining company excepting as to the result of his work. The miner, therefore, was exercising an independent employment under statutory regulations, exercising his skill and judgment as a miner in the prosecution of his work, the execution of which was left entirely to his discretion, without any restriction as to its exercise or limitation, either as to the manner in which or as to the time in which the work had to be done. We find, therefore, abundant substantial testimony to support the findings of fact of the Workmen's Compensation Commission that the claimant rendered his services to the defendant in the course of an independent

occupation representing the will of the mining company only as to the result of his work and not as to the manner in which it was accomplished, and that the claimant in the instant case was an independent contractor."

The Supreme Court of Missouri (337 Mo. 718) quashed its writ of certiorari issued in the **Woodruff** case, saying (l. c. 725):

"We fail to see how there is any conflict between this court's definition of an independent contractor and the ruling in the opinion of the Court of Appeals that a miner digging mineral, under the circumstances and arrangements stated therein, on the property of a mining company is as toward it an independent contractor, contracting to dig and deliver its mineral to its mill at the price paid to others therefor. It would seem that Woodruff did exercise an independent employment (independent of control or right to control the time, means, or agencies thereof); that he did contract to do the work according to his own methods (without supervision or direction and with his own equipment); and that he was not subject to the control of the mining company except as to the result of his work (the result contemplated being that he would deliver to the company mill all of the tiff he could dig in three years working at least two-thirds of each month). He was to be paid in accordance with the result of his work, namely, for the amount of tiff which he brought to the mill, at the price paid to others for the same mineral, except that he was required to deliver a certain amount without charge, as royalty, which no doubt in this case the mining company, as lessee, was obligated to deliver to the owner of the leased land. It seems that there is authority in other jurisdictions for holding that somewhat similar arrangements do create the relation of independent contractor between the miner and the mining company (citation of authority). This court certainly has never held otherwise."

We, therefore, submit that under their statutory contract with the petitioners, as interpreted by the Missouri courts, the miners are not employees. At most, they are independent contractors if the Board's finding that petitioner, R. A. Blount, controls the disposition of the tiff is supported by the evidence. The haulers are also not employees under the law of the State of Missouri, since they own their own trucks and the petitioners have no control over how and when they do their hauling. **Rutherford v. Tobin Quarries, 336 Mo. 1171, 82 S. W. (2d) 918.** The court below, therefore, erred in not holding that the status of the miners and haulers as independent contractors under their contracts and the law of the State of Missouri is controlling on the Board.

Tyler v. United States, 281 U. S. 497, 501, 50 S. Ct. 358, 74 L. ed. 991;
Metropolitan Life Ins. Co. v. United States, 6 Cir., 107 F. (2d) 311, certiorari denied 310 U. S. 630, 60 S. Ct. 978, 84 L. ed. 1400;
Dayton & Mich. R. Co. v. Commissioner, 4 Cir., 112 F. (2d) 627, 630.

IV.

The decision of the court below fails to take into account the fact that the Board's order (1) places the petitioners in the position of being required to violate their contracts with the miners under the Missouri Mining Act, and (2) denies the liberty of contracting to assume relationships which do not contain the elements of control inherent in the employer-employee relationship—all of which is in violation of the Fifth Amendment to the Constitution of the United States.

The Board's order boils down to requiring the petitioners to change, or attempt to change, the independent status of the miners, all of whom, under the Missouri stat-

utes and long-established principles of federal and state law, are independent contractors or producers, into that of employees. That the Union contemplates a fundamental change in the status of the miners is evidenced by the testimony of the union president to the effect that he requested petitioner R. A. Blount to bargain with respect to "seniority rights," "rates of pay," and a "check-off system" (R. 19). The union, therefore, does not desire to bargain respecting the selling price of tiff, but its purpose is to require the petitioners to engage the miners as employees under a contract prescribing "rates of pay" and, a fortiori, definite hours of employment. This means that the petitioners would have to cease being mere landowners and be required to go into the business of mining tiff, with the necessity of installing a system of supervision and control over the manner in which the miners perform their work.

The unconstitutional effect of the Board's order is twofold: **First,** it enables persons who have contracted to assume an independent relationship to resort to the processes of the Board to compel the person with whom they contract to abrogate the existing contract and negotiate a new one creating a fundamentally different relationship; **secondly,** the petitioners are placed in a position of being required to violate their contract with the miners created under the Missouri Mining Act. Neither the Board nor the Circuit Court of Appeals held that the miners were not subject to the Missouri Mining Act, Sections 13593 to 97, R. S. Mo. 1929, Sections 14783 to 87, R. S. Mo. 1939; yet both required the petitioners to treat the miners as employees and comply with the terms of the National Labor Relations Act. The order of the Board would require the petitioners to negotiate with the miners concerning wages, hours and conditions of employment. The Missouri Mining Act, supra, requires the petitioners to treat the miners as

independent contractors and forbids the petitioners to interfere with the free exercise of their rights under the Mining Act, including the miners' right to work where they please, when they please, how they please and how much they please. If a miner is an employee, as the Board holds, then the petitioners certainly would have the right to discharge him. Yet if the petitioners undertook to do so, they would be liable to the miner under the Missouri Mining Act. There is, therefore, an irreconcilable conflict between the order of the Board and the Missouri Mining Act unless the National Labor Relations Act nullifies the Missouri Mining Act. The petitioners might attempt to "discharge" a recalcitrant miner who resists supervision or control, or who refuses to join the union pursuant to a closed-shop contract, or who refuses to pay his union dues, or who is told that he can no longer mine because his seniority is not as great as that of another miner, but the miner could resist the discharge or eviction in the Missouri courts.

The foregoing illustrates a fact which should have been clear to the Board, that "collective bargaining" is an impossibility with miners who are subject to the provisions of the Missouri Mining Act (as was admittedly the case of all miners in the instant case). The Board's order is arbitrary and a denial of the obligation and freedom of contract, and, therefore, in violation of the Fifth Amendment to the Constitution of the United States. Since there is serious doubt, to say the least, as to the constitutionality of the act as applied by the Board in this case, the court below should have denied enforcement of the Board's order.

Wright v. Mountain Trust Bank, 300 U. S. 400, 57 S. Ct. 566, 81 L. ed. 736.

CONCLUSION.

For the foregoing reasons petitioners urge that a writ of certiorari issue to the United States Circuit Court of Appeals for the Eighth Circuit to the end that this case may be reviewed and determined by this Court, and that the judgment of the Circuit Court of Appeals enforcing the order of the National Labor Relations Board be reversed.

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APPENDIX A.

Sec. 2 (2) and (3) of The National Labor Relations Act.

(2) The term "employer" includes any person acting in the interest of an employer, directly or indirectly, but shall not include the United States, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.

APPENDIX B.

Section 13593, R. S. of Missouri 1929 (Sec. 14783, R. S. Mo. 1939).

Rights of miners and owners of mineral lands—condition of permits.—When any person owning real estate in this state, or any person having a leasehold interest in such real estate for mining purposes by lease from the owner thereof duly acknowledged and recorded in the county wherein the land lies, shall permit any person or persons, other than their servants, agents or employees, to enter and dig or mine thereon for lead, ore or other minerals, with the consent of such owner or lessee, he or they shall keep a printed statement of the terms, conditions and requirements upon which such may be mined or prospected, and the time during which the right to mine or prospect thereunder shall continue, posted or hung up in a conspicuous place, in plain, legible characters in the principal office or place of business of such person or company in the county in which said lands are situated, or in a county contiguous thereto, and shall deliver to any person mining or prospecting, or about to mine or prospect on said lands, and requesting it, a printed copy of such statement; all persons digging or mining said land, after the posting of such statement, shall be deemed to have agreed to and accepted the terms thereof, and shall, together with such owner or lessee, be bound thereby, and upon failure or refusal to comply with the terms, conditions and requirements of such statement, he or they shall forfeit all right thereunder, and the owner or lessee, as aforesaid, of such lands, may re-enter thereon and take possession of the same, nor shall the receipt of any ore or mineral by any such owner or lessee, after any such forfeiture has been incurred, be deemed or taken as a waiver of such forfeiture.

Section 13594, R. S. of Missouri 1929
(Sec. 14784, R. S. Mo. 1939).

Forfeiture.—Whenever any such owner or lessee of real estate shall permit any person or persons, other than their servants, agents or employees, to enter and dig for lead, ore or other minerals on such real estate, with his consent, but without such owner or lessee complying with the provisions of Section 13593, and such person or persons having so entered upon said lands by the permission or consent of such owner or lessee as aforesaid, and having in good faith dug or opened any shaft, mine, quarry, prospect or deposit of mineral, or extended or opened from any shaft or mine any room, drift, entry or other excavation, he or they shall have the exclusive right as against such owner or lessee giving such permit or consent, and against any person claiming by, through or under such owner or lessee, to continue to work, mine and dig such shaft, mine, prospect or deposit of mineral so dug or opened by him or them as aforesaid, in said real estate, with a right-of-way over such lands for the purpose of such mining, for the term of three years from the date of the giving of such consent or permit: **Provided, however,** that if such person or persons, in each case so mining as aforesaid, shall fail or neglect to work or cause to be worked such shaft, mine, quarry, prospect or deposit of mineral for ten days, not including Sundays, in any one calendar month, after commencing such work, he or they shall forfeit all rights to work, mine or hold the same as against such owner or lessee, unless such failure or neglect was caused by unavoidable circumstances, or by the act of such owner or lessee or his agent, or unless such owner or lessee consent thereto: **Provided further,** that such person or persons, so mining as aforesaid, shall pay to the owner or lessee of said lands giving such permit or consent

the royalty for mining thereon, at least once every month, if demanded by such owner or lessee, by delivering the same to him at or near the mouth or opening of such mine, shaft or quarry, or at the nearest usual place of business of such owner or lessee, or at any other place that may be agreed upon by such miner and owner or lessee; which said royalty, unless otherwise agreed upon by them, shall be the same in kind and proportionate amount as is paid by others mining the same kind of ore or mineral on said lands to such owner or lessee, or the value of such royalty in cash; and if there be no other person mining on said lands on terms prescribed by such owner or lessee, then he or they shall pay to such owner or lessee the same rate or kind of royalty on lead, ore or minerals taken out by him or them as is paid by miners on lands nearest thereto belonging to other persons, or the value of such royalty in cash. Such owner or lessee of any real estate shall have a lien on all minerals taken or dug therefrom for the royalty due thereon until the same is paid; and if any such person or persons so mining shall refuse or fail to pay such royalty to such owner or lessee, or his agent, when demanded as aforesaid, he or they shall thereby forfeit the right to work such mine, shaft, quarry, prospect or deposit of mineral, and the said owner or lessee may thereupon enter and take possession of the same.

Section 13595, R. S. of Missouri 1929 (Sec. 14785, R. S. Mo. 1939).

Tender of payment.—Any such person or persons who, by the permission or consent of the owner or lessee of any real estate, and having the right to mine thereon, and having entered and dug or mined thereon any lead ore or other mineral, shall have the right to the exclusive possession of such ore or mineral, except the royalty thereon, which shall be paid as hereinbefore provided, until he or

they shall be paid or tendered by such owner or lessee of such real estate the then highest market price in cash paid by such owner or lessee for the same kind of ore or mineral dug or mined on said lands, and if no other such ores or minerals are at the time being dug or mined on said lands and sold to such owner or lessee, then the highest price paid for such ore or mineral dug on lands nearest thereto shall be paid or tendered by such owner or lessee in such case, and upon such payment or tender, the absolute right to the possession of such lead ore or other minerals so dug out and mined under the provisions of the next preceding section, and for which such payment or tender shall have been made, shall vest in such owner or lessee.

Section 13596, R. S. of Missouri 1929 (Sec. 14786, R. S. Mo. 1939).

Notice to owner or lessee.—If any person or persons having dug or mined lead ore or other minerals, and having the same in his or their possession, and having offered to deliver such mineral according to contract, or paid or tendered the royalty, if any, due thereon, or the value of such royalty in cash, to such owner or lessee of said real estate, or to his agent, shall serve or cause to be served a notice in writing upon such owner or lessee or his agent, by delivering a copy thereof at the usual place of abode of such owner, lessee or agent, with some member of the family over the age of fifteen years, stating in such notice the amount of lead ore or other mineral he or they have ready for delivery, and requiring such owner, lessee or agent to receive and pay for the same, the said owner or lessee shall, within five days after the service of such notice, receive and pay for such lead ore or other mineral which the said person or persons digging or mining the same may deliver to him, not exceeding the amount named

in the notice; and in such case, if such owner or lessee fail or refuse within the time aforesaid to pay for such lead ore or mineral delivered or offered to be delivered to him as aforesaid at the said price, then in that event the said person or persons who dug and mined the same shall thereupon acquire an absolute title to such lead ore or mineral, and may thereupon dispose of the same to any person or in any manner he or they may choose.

Section 13597, R. S. of Missouri 1929 (Sec. 14787, R. S. Mo. 1939).

Sale of Ore.—All lead ore or other mineral, dug or mined in or upon the lands of any person in this state, shall be deemed and held to be the absolute property of the owner or lessee of such lands, except in cases where it is modified, changed or transferred by express contract, and any person who shall unlawfully sell or convert, to his own use, or remove or dispose of, or in any manner make away with or conceal any such ore or mineral, so as to deprive the owner thereof of the same, shall be deemed guilty of grand or petit larceny, according to the value of such ore or mineral.

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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 838

R. A. BLOUNT, HEARST B. BLOUNT, LONNIE FLINN AND EUNICE SIMPSON, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinions of the court below (R. 545–559) are reported in 131 F. (2d) 585. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 523–536) are reported in 37 N. L. R. B. 662.

JURISDICTION

The decree of the circuit court of appeals (R. 561–562) was entered on December 24, 1942. A petition for rehearing filed by petitioners was denied on November 27, 1942 (R. 561). The peti-

tion for a writ of certiorari was filed on March 19, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) of the National Labor Relations Act.

QUESTION PRESENTED

Whether the Board properly determined that certain miners who mine on petitioners' land and certain haulers who haul the mine products are employees of petitioners within the meaning of Section 2 (3) of the Act.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in the Appendix, *infra,* pp. 19–21.

STATEMENT

Petitioners, R. A. Blount, H. B. Blount, Lonnie Flinn, and Eunice Simpson, own, as tenants in common, and operate a tract of approximately 640 acres of land known as the Paw Paw Patch, in the vicinity of Richwoods, Washington County, Missouri (R. 412). The land is managed by petitioner R. A. Blount, who engages miners and haulers to extract a mineral substance known as barite or tiff from petitioners' property and to transport it to points of sale (R. 412, 413, 428A, 428B).[1]

[1] The production of tiff from the Patch in 1939 and 1940 approximated 3,800 tons in volume and $24,000 in value

On January 23, 1940 representatives of International Union of Mine, Mill and Smelter Workers, Local 113, requested petitioners to bargain collectively with the Union as the majority representative of the 79 miners and haulers engaged in the mining and transportation of barite on and from petitioners' land (R. 13–14, 18–19, 22, 24, 99, 106–114, 116–121, 130–135, 444–450). Petitioners refused to bargain on the ground that the persons for whom the Union sought to bargain were "independent contractors" and not employees of petitioners (R. 23).

Upon charges filed with the Board and after appropriate proceedings, the Board issued its findings of fact, conclusions of law and order (R. 523–539), holding that the miners and haulers are employees of petitioners within the meaning of Section 2 (2) and (3) of the Act (R. 528). The Board found that a majority of the miners and haulers had designated the Union as their representative and that petitioners had refused to bargain with the Union in violation of Section 8 (5) of the Act (R. 532). It directed petitioners to cease and desist from their unfair labor practices, to bargain collectively with the Union and to post appropriate notices (R. 535–536). This order of the Board was enforced in full by the court below (R. 545–562).

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for each year (R. 412–413). Petitioners also operate in the same way another tract of land in Washington County (R. 96–97).

The only issue raised in this Court is the propriety of the Board's determination, which was sustained by the court below (R. 551–552), that the miners and haulers working on petitioners' land are their employees within the meaning of the Act. The evidence supporting the Board's determination may be summarized as follows:

Both miners and haulers must obtain permits from petitioners before they begin work (R. 414–415). In each permit to a miner, R. A. Blount designates the hauler to whom the miner is to deliver for transportation the tiff dug by him (R. 428B, 430A). Permits to haulers specify the number of miners for whom the hauler is authorized to transport mined tiff (R. 430B).[2] The same individual may on occasion be engaged to perform a dual function as both miner and hauler (R. 430B, 431).[3] Permission to work at mining

[2] The permit in each instance is in the following form, the assigned work being entered in the appropriate space (R. 428B, 430B):

Date _____

This permit authorizes_____ to [mine on; haul from; haul and mine on (as the case may be)] property under control of R. A. Blount. Ore to be clean and dry when delivered to scales.

NO ORE SOLD WITHOUT PERMIT

Hauler _____

Miner _____

(Signed) R. A. BLOUNT.

[3] Petitioners have the right to control the allocation of haulers to particular miners (R. 34–35, 124–126, 130, 138–139).

or hauling carries with it a privilege to erect a shelter upon petitioners' property without payment of ground rental (R. 414). At the time of the hearing there were approximately 35 or 40 families on the Paw Paw Patch residing in shelters built by the workers or their predecessors (R. 33–34).

The permits issued to miners and haulers contemplate, and both miners and haulers are engaged in, a continuing relationship with petitioners, which is delimited neither by the completion of any specific task nor by the extraction or transportation of any specific quantity of barite.[4] Petitioners have, however, summarily cancelled mining and hauling permits (R. 56–59, 428, 429, 430B, 431; see *infra*, p. 8).

The work of both miners and haulers is unskilled (R. 73, 140, 230). All the tiff mined upon petitioners' property is extracted by hand methods (R. 413). A shallow shaft is generally

[4] The work record of the following miners and haulers is shown by their testimony:

Name	Classification	Date of commencement of work for petitioners	Record reference
Willis Emily	Hauler	1937	122
George Bourbon	Miner	1931 or 1932	137
Dan McGee	Miner and hauler	1926	200
Floyd Brown	Miner	1934 or 1935	221
Harry Stroup	Miner	1936	238
Curtis Colter	Miner	1935	243
Jake Colter	Miner	1935	254
Ernest DeClue	Miner	1934	263
Fred Courtway	Miner	1922	278
Ed Howard	Miner	1932	297
Walter Brolyer	Miner	1934	303
Adam Govero	Hauler	1930	307
Sam Givens	Miner and hauler	1933	319
Francis Valle	Miner	1935	323
Tom Smith	Miner	1932	326

dug by the miner and the ore thrown to the surface by hand; in rare instances deep shafts are dug and a bucket and hand windlass are employed to raise the tiff from the excavation (*id.*). The tiff is then rendered marketable, for unless it is clean and dry it is rejected by the purchaser (R. 40, 333–334; *supra,* p. 4 n. 2). When a load is accumulated the miner notifies the hauler assigned to him (R. 227), and the hauler carries the load by his truck to those, situated at a considerable distance from the property (R. 48, 129, 412–413), who have arranged with petitioners for purchase of the Patch's production (R. 139, 164–165).[5] Purchasers of petitioners' tiff will not accept delivery without the presentation of the permits issued by petitioners authorizing mining and hauling (*supra,* p. 4 n. 2; R. 209).

After delivery, miners and haulers receive, as pay for their labors in excavating and transporting the tiff, a share in the proceeds of the sale; petitioners retain the remainder of the sale price as royalty (R. 38–39, 412). Average earnings of miners are approximately $6 per week (R. 141–143, 229–230, 247–248, 258–259).

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[5] The mining of tiff as above described is performed by approximately 2,000 miners upon various tracts of land in Washington County which produces approximately 25 percent of the national barite output (R. 33). The work pattern involved here is characteristic of the industry in general. See *Woodruff* v. *Superior Mineral Co.*, 230 Mo. App. 616, 70 S. W. (2d) 1104, certiorari quashed, 337 Mo. 718, 85 S. W. (2d) 743. The problems common to the workers in the industry in Washington County resulted in a strike in 1935 (R. 47, 346).

The tiff is purchased either by petitioner R. A. Blount, who conducts his purchasing operations as jobber apart from his functions as coproducer of barite with his cotenants and as manager in charge of the operation of the Patch (R. 412), or by other buyers with whom petitioners enter into arrangements (R. 43, 46–47, 139, 164–165, 257–258, 343). Buyers deal directly with petitioners who exercise full control over the marketing of the tiff (*id.*). Blount in 1939 purchased approximately 80% of the Patch's production (R. 412).

Following the settlement of a strike in 1935 (*supra,* p. 6 n. 5) and until June 1939 when all purchases of tiff from the Patch ceased temporarily (R. 37–38, 68, 72), the miners received the uniform return of $4.50 per ton of tiff despite variations in the gross price, the difference being reflected only in varying haulage and royalty payments (R. 38, 39, 44, 47, 61, 278, 320–321, 338, 339).[6] On June 24, 1939, petitioner R. A. Blount, at that time the sole remaining outlet for petitioners' tiff, temporarily ceased purchasing (R. 37, 72) and on July 15, 1939, petitioners caused the following notice to be circulated among the miners and haulers (R. 60–61, 428):

[6] In those instances when petitioner R. A. Blount purchased the tiff mined on petitioners' land, the other petitioners received approximately 30 cents less per ton royalty than when some other purchased. Twenty-five cents per ton of this difference accrued to Blount as "loading" charge and "selling profit," items which were not deducted by other purchasers (R. 38–39, 44, 47).

Effective on and after August 15, 1939, our price on Barytes mined and hauled from property in Richwoods district will be as follows:

Mining, $3.90 per ton (2,000)#.

Hauling, $1.40 per ton (2,000)#.

Please notify all miners you haul for of this change.

Clean dry ore.

(s) R. A. BLOUNT,
Agent.

In protest against this reduction in return to the miners and haulers for their labor, the workers of the Patch struck (R. 25, 70). During the pendency of this dispute in the fall of 1939, petitioners posted a notice prohibiting further mining or prospecting in the Patch (R. 50, 70), sent notices cancelling existing permits (R. 56–59, 428–429, 431), and took steps to clear the land of miners and haulers (R. 65, 67, 74–75, 77, 78–80, 81, 83, 431–443).

After picketing ceased, petitioners, in the fall of 1939, arranged for the sale of the tiff which had theretofore been mined on the Patch before operations ceased but which had not been sold (R. 37–38, 46). The purchaser dealt directly with R. A. Blount, who, as agent for the other petitioners, arranged for the sale, sent appropriate instructions to the miners and haulers, and paid them their share of the purchase price (R. 38, 45–47). The gross price received by petitioners for this shipment of tiff was $6 per ton and the

net compensation of the miners and haulers per ton delivered was that which had been established by petitioners' notice of July 15, 1939, $3.90 and $1.40 per ton, respectively (*supra,* p. 8, R. 38).

Following this transaction petitioner R. A. Blount, in January 1940, again began purchasing tiff and thereafter was the sole buyer of tiff produced on petitioners' property, petitioners paying the miners and haulers in accordance with the scale previously established by them (R. 45, 51).

ARGUMENT

1. The only question presented by the petition, whether the Board and the court below properly held that the relationship between petitioners and their miners and haulers comes within the Act, turns upon its own facts and is not of general importance in the administration of the Act.

More than half of the tiff industry of the United States is concentrated in Missouri and from 50 to 90 percent of the tiff produced in Missouri comes from the county in which petitioners' lands are located (R. 32–33). Petitioners point to a Missouri statute of 1877 enacted to deal with relationships of land owner and ore prospector as the sole source of all rights and duties arising out of their relationship (Pet. 5, 16–22). As petitioners state, this statute by its terms accords to any miner who comes upon the land without an agreement with the land owner which has been posted as a notice, the right to continue mining for a term of 3 years provided he does not discontinue mining for as

long as 10 consecutive days, excluding Sundays, in any calendar month (Pet. 5). However, because title to the mined ore is in petitioners who control the price and marketing structure, petitioners can in effect discharge the miners and haulers at will by denying them a market (R. 37, 43–44, 46–47, 50–51, 60–61, 72, 164–165, 257–258, 343, 431–443) and thus render academic any rights conferred by the Missouri statute. This is particularly true in view of the extremely primitive conditions under which the miners and haulers work and live, with its accompanying poverty (R. 141–143, 229–230, 247–249, 258–259, 413).

Because of the combination of these unique features, this case presents no problem of probable recurrence.

2. In any event, the decision of the court below is correct, presents no conflict, and is in accord with general principles enunciated by this and other courts.

Petitioners contend that the miners and haulers are not "employees" within the meaning of the Act because they are subject to control only with respect to the result of their services and not with respect to the time and manner of their performance of the services rendered (Pet. 3, 6, 8, 9, 13). In thus selecting from among conflicting common law descriptions of the master and servant relationship that test which most narrowly construes the relationship, petitioners ignore principles, established by this Court, that the application of

federal policy to a particular field cannot be made to turn upon concepts borrowed from other fields or from legislation passed for other purposes but rather that Congressional intent as to the scope of coverage must be sought in the distinctive aims of the legislation under consideration. *Cf. United States* v. *American Trucking Assns.*, 310 U. S. 534, 545; *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U. S. 251, 256–258; *Warner* v. *Goltra*, 293 U. S .155, 158; *International Stevedoring Co.* v. *Haverty*, 272 U. S. 50; *National Labor Relations Board* v. *Waterman Steamship Corp.*, 309 U. S. 206, 218–219.[7]

A concept borrowed from the common law supplies no guidance in charting the scope of the employment relationship under the Act since the Act is concerned, not with the liability of a master for injury caused by a servant to a third party nor with

[7] In the following cases persons allegedly working as lessees or independent contractors in extractive industries have been held encompassed by social legislation enacted for the protection of employees. *Lehigh Valley Coal Co.* v. *Yensavage*, 218 Fed. 547, 552–553 (C. C. A. 2), certiorari denied, 235 U. S. 705; *Woodruff* v. *Superior Mineral Co.*, 230 Mo. App. 616, 70 S. W. (2d) 1104, certiorari quashed, 337 Mo. 718, 85 S. W. (2d) 743; *Bidwell Coal Co.* v. *Davidson*, 187 Iowa 809, 174 N. W. 592; *National Tunnell & Mines Co.* v. *Industrial Commission*, 99 Utah 39, 102 P. (2d) 508; *Combined Metals Reduction Co.* v. *Industrial Commission*, 101 Utah 230, 116 P. (2d) 929; *Martin* v. *Republic Steel Co.*, 226 Ala. 209, 146 So. 276; *Arizona-Hercules Copper Co.* v. *Crenshaw*, 21 Ariz. 15, 184 Pac. 996. Cf. *Oliver Iron Co.* v. *Lord*, 262 U. S. 172, 179–180; *Pottorff* v. *Fidelity Coal Mining Co.*, 86 Kan. 774, 122 Pac. 120.

principles of vicarious liability (*e. g.*, Restatement of the Law of Agency, Ch. 7), but with the risk of industrial disputes in interstate commerce and the protection, not merely of employees, but of "workers" in their rights of self-organization. Section 1 of the Act; cf. *National Labor Relations Board* v. *Carlisle Lumber Co.*, 99 F. (2d) 533, 536–537 (C. C. A. 9); *Consolidated Edison Co.* v. *National Labor Relations Board*, 95 F. (2d) 390, 394 (C. C. A. 2), affirmed on this point, 305 U. S. 197. The right to control or veto the conduct of another at a particular point in time does not, as petitioners contend, limit the reach of the Act. As this Court has held, "We are dealing here not with private rights * * * nor with technical concepts pertinent to an employer's legal responsibility to third persons for acts of his servants." *International Association of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 80.[8]

The text of the Act reflects the Congressional intent to use the term "employee" in a broad nontechnical sense.

Thus, Section 2 (3) of the Act defines "employee" as follows:

> The term "employee" shall include any employee, and shall not be limited to the

[8] See also: *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261, 269; *National Licorice Co.* v. *National Labor Relations Board*, 309 U. S. 350, 369; *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177, 193–194; *National Labor Relations Board* v. *Colten*, 105 F. (2d) 179, 182–183 (C. C. A. 6); *National Labor Relations Board* v. *Wm. Tehel Bottling Co.*, 129 F. (2d) 250 (C. C. A. 8).

> employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.

A purpose to shape this broad employment concept (cf. *Fleming* v. *Palmer,* 123 F. (2d) 749, 762 (C. C. A. 1); *Fleming* v. *Hawkeye Pearl Button Co.,* 113 F. (2d) 52, 56 (C. C. A. 8)) to the contours of the collective bargaining relation and to abandon common law formulations is manifest not only from the specific inclusion of those who are not covered by the common law definition pressed by petitioners, such as strikers and those not the employees of a particular employer (cf. *Phelps Dodge Corp.* v. *National Labor Relations Board,* 313 U. S. 177, 191–192), but also from the exemption of common law employees such as domestic servants and agricultural laborers. *North Whittier Heights Citrus Ass'n* v. *National Labor Relations Board,* 109 F. (2d) 76, 80 (C. C. A. 9), certiorari denied, 310 U. S. 632. The same aim is evident in Section 2 (9) of the Act which defines "labor dispute" to include a controversy concerning the representation, not of employees, but

of "persons" (Appendix, p. 21).[9] The Board has interpreted the broad language of the Act in the light of the Congressional policy expressed in Section 1 of the Act in a series of decisions.[10]

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[9] Section 13 (C) of the Norris-LaGuardia Act (29 U. S. C. § 113 (c), 47 Stat 73) defines "labor dispute" in identical terms. S. Rep. No. 573, 74th Cong. 1st Sess. p. 7. In *Milk Wagon Drivers' Union* v. *Lake Valley Farm Products, Inc.*, 311 U. S. 91, 98–99, the Court reversed a decision of the Seventh Circuit Court of Appeals which held that no labor dispute existed within the meaning of the Norris-LaGuardia Act because the vendors of milk there involved were "independent contractors * * *. They buy and sell for their own profit and are not salaried workers" (108 F. (2d) 436, 442). Compare *Columbia River Packers Association Inc.* v. *Hinton*, 315 U. S. 143, 147.

[10] For example: *Matter of Metro-Goldwyn-Mayer Studios*, 7 N. L. R. B. 662, 686–690 (professional writers working exclusively for one company); *Matter of Seattle Post-Intelligencer*, 9 N. L. R. B. 1262, 1270–1275 (newspaper distributors exclusively for one company, who own their own truck and hire their own assistants); *Matter of KMOX Broadcasting Station*, 10 N. L. R. B. 479 (free-lance announcers and radio artists); *Matter of Connor Lumber and Land Co.*, 11 N. L. R. B. 776 (lumber workers under sole direction of contract but work on company premises, work functionally coherent with company's business and subject to conditions established by company); *Matter of Interstate Granite Corp.*, 11 N. L. R. B. 1046 (colorable lease of a department of an enterprise); *Matter of Trawler Maris Stella, Inc.*, 12 N. L. R. B. 415 (fishermen paid in proportion to selling price of catch); *Matter of American Scale Co.*, 19 N. L. R. B. 124 (colorable lease); *Matter of Sun Life Insurance Co.*, 15 N. L. R. B. 817 (insurance canvassers); *Matter of Park Floral Co.*, 19 N. L. R. B. 403 (colorable lease of greenhouses; work of growers a stage in and integral part of company's entire business; leases involved not so much the accomplishment of any specified result as a continuing op-

These decisions bring within the coverage of the Act all those who do not serve the general public or a limited portion thereof [11] but are engaged in

eration in close association with whole of company's enterprise); *Matter of Edward F. Reichelt et al.*, 21 N. L. R. B. 263 (colorable lease of fur business); *Matter of Kelly Co.*, 34 N. L. R. B. 325 (two truck owners working exclusively for company held employees, three working for others as well held independent contractors); *Matter of Post-Standard Co.*, 34 N. L. R. B. 226 (newspaper distributors, despite method of payment, functionally related to company's business); *Matter of Twentieth Century-Fox*, 32 N. L. R. B. 717 (artists working on premises exclusively for one company held employees; free-lance artists working for various companies held not employees); *Matter of James E. Stark Co.*, 33 N. L. R. B. 1076 (lumber crew working under contractor at hours and wages fixed by company); *Matter of Deep River Timber Co.*, 37 N. L. R. B. 210 (those working under contractors preparing roadways and hauling logs employees of company in view of interrelation of all operations at logging camp, assumption by company of responsibility for wage payments of both contractors, and past bargaining history); *Matter of John Yasek*, 37 N. L. R. B. 156 (truck owners hauling logs principally for one company); *Matter of Harry Murphy*, 37 N. L. R. B. 487 (owners of single trucks hauling logs, compensated at footage rate; no finding as to owners of more than one truck, since evidence unavailable as to whether such owners are engaged in independently established businesses of trucking and transfer); *Matter of Phelps Dodge Corp.*, 34 N. L. R. B. 846 ("contractor" unloading ore on an equal share carload basis); *Matter of Veta Mines*, 36 N. L. R. B. 288, 292 (sections of mine unprofitable for normal company operation, worked by "leasers" who hired "partners"; both "leasers" and "partners" employees).

[11] The fact that the workers herein involved have on occasion abandoned their work for public relief work or other private employment does not, as petitioners suggest (Pet. 5), convert them into independent enterprisers.

the day-to-day rendition of service for another in the usual course of a business. It is this type of service which generates problems which constitute the subject matter of collective bargaining; the work of such persons is objectively characterized by conditions which give rise to the method of group, rather than individual, bargaining and to the bargaining sanction of the strike. The facts summarized in the Statement (*supra*, pp. 2–9) fall within this employment concept. The tiff industry is characterized by an economic relationship which gives rise to industrial disputes; two such disputes have already occurred, one of which involved the 2,000 workers in the industry in Washington County (*supra*, p. 6, n. 5, p. 8).

Even if local law governed the determination of who is an employee within the meaning of the Act,[12] *Woodruff* v. *Superior Mineral Co.*, 230 Mo. App. 616, 70 S. W. (2d) 1104, certiorari quashed, 337 Mo. 718, 85 S. W. (2d) 743, relied upon by petitioners (Pet. 9, 13, 16, 17, 18, 19), does not collide with the Board's finding of an employment relationship. Petitioners' assertion to the contrary is premised not only upon the assumption that the scope of the Act's coverage is coextensive with the common law of master and

[12] Cf. *D'Oench, Duhme & Co.* v. *Federal Deposit Ins. Corp.*, 315 U. S. 447; *Burk-Waggoner Ass'n* v. *Hopkins*, 269 U. S. 110; *Lyeth* v. *Hoey*, 305 U. S. 188; *Morgan* v. *Commissioner of Internal Revenue*, 309 U. S. 78, 80; *Helvering* v. *Hallock*, 309 U. S. 106, 118; Section 10 (a) of the Act.

servant but also upon an erroneous construction of Missouri mining law. This construction is not supported by the face of the Missouri statutes relied on by petitioners nor by the *Woodruff* case which interprets those statutes. It was not accepted by the circuit court of appeals (R. 546–553) for the circuit which embraces Missouri. It is not, therefore, a question which this Court will review. *Helvering* v. *Stuart,* 317 U. S. 154.

The *Woodruff* case supports the Board's finding of an employment relationship since it holds that workers, such as those involved herein, are not vendors of a commodity,[13] but are employees within the meaning of Section 3308 (a) of the Missouri Workmen's Compensation Act because they are engaged in rendering a service to the operator which is part of the "usual business" of producing tiff.[14]

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[13] *Columbia River Packers Association, Inc.* v. *Hinton,* 315 U. S. 143, also relied upon by petitioners (Pet. 8, 11, 15), involved a dispute between an association of vendors and a purchaser.

[14] Missouri Workmen's Compensation Act, Section 3308 (a) R. S. Mo. 1929) provides:

"Any person who has work done under contract on or about his premises which is an operation of the usual business which he there carries on shall be deemed an employer and shall be liable under this chapter to such contractor, his subcontractors, and their employes, when injured or killed on or about the premises of the employer while doing work which is in the usual course of his business."

The requirement under this provision that the work done be "an operation of the usual business" of another is a domi-

CONCLUSION

The decision of the court below is correct and presents neither a conflict of decisions nor a question of general importance. The petition should, therefore, be denied.

Respectfully submitted.

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nant element of the employment relationship under the Act. See *supra*, pp. 14–16; compare *Matter of Deep River Timber Co.*, 37 N. L. R. B. 210 with *Cates* v. *Williamson* (Mo. App.), 117 S. W. (2d) 655.

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., Sec. 151 *et seq.*), are as follows:

> SECTION 1. The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.
>
> The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and

by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

SEC. 2. When used in this Act—

* * * * *

(2) The term "employer" includes any person acting in the interest of an employer, directly or indirectly, but shall not include the United States, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an

employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.

* * * * *

(9) The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

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